

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2014AP1064

Cir. Ct. No. 2012CV587

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**JASON R. GUM, A DISABLED PERSON, BY HIS LEGAL GUARDIAN,
RACHEL MORZFELD,**

PLAINTIFF-APPELLANT,

v.

**KENOSHA ACHIEVEMENT CENTER, INC., PHILDELPHIA INDEMNITY
INSURANCE COMPANY, JEANNE KLEMP AND JOHN DOE,**

DEFENDANTS-RESPONDENTS,

DONALD J. HALL,

DEFENDANT.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 GUNDRUM, J. Jason Gum, a cognitively challenged adult, by his guardian, appeals the circuit court’s dismissal upon summary judgment of his claims against the Kenosha Achievement Center, Inc., Philadelphia Indemnity Insurance Company, Jeanne Klemp, and John Doe¹ related to a sexual assault committed against him by one of the KAC’s bus drivers, Donald Hall.² The circuit court concluded Respondents owed Gum no duty of care with regard to the assault. Because of its ruling on this issue, the court did not address public policy considerations argued by Respondents or Respondents’ alternative ground for summary judgment that Gum’s claims were barred by the statute of limitations.

¶2 On appeal, Gum asks us to reverse the circuit court, remand the case for trial, and proactively address the public policy considerations due to his concern they “will likely be raised again” on remand. Respondents urge us to affirm the circuit court on the issue of duty or alternatively on the statute of limitations ground. We conclude that genuine issues of material fact exist that preclude summary judgment on both the duty and statute of limitations questions and that it is premature to address the public policy considerations. We reverse and remand for further proceedings.

Background

¶3 On November 2, 2006, Hall, while off duty from his job as a bus driver for the KAC, enticed Gum into his private vehicle after Gum had concluded

¹ We use “KAC” to refer to the Kenosha Achievement Center, Inc., and “Respondents” to refer to the KAC and the other defendants-respondents collectively.

² On May 13, 2008, Hall was convicted of sexually assaulting Gum in relation to this incident.

his work-training day at the KAC and was waiting to take the KAC bus home. Hall drove Gum to a park where he sexually assaulted Gum. On March 6, 2012, Gum, through his guardian, filed the present lawsuit related to the incident. Our review of the record discloses the following.

¶4 Christine Weyker, a KAC employee at the time of the assault and the KAC's director of operations at the time of her deposition, provided the following deposition testimony. The KAC is a community-based rehabilitation facility which provides "facility-based employment for adults with disabilities." Gum had been admitted to the KAC in 2000 "as a person with a disability with a stated goal of interest in employment—pursuing employment skills." He participated in a KAC program "designed to foster the independence of people," and received "work skills training." Weyker testified that KAC records indicate that when Gum was admitted he had a "cognitive disability" identified as "cognitive delay." Weyker, who had training in special education, testified that "[a] cognitive delay would impact a person's intelligence and/or ability to reason or make decisions." She also testified that Gum had proven himself to be "pretty dependable," and was afforded a "great deal of independence ... vocationally."

¶5 The KAC made bus transportation available for "clients" such as Gum to utilize to and from the KAC. For clients who chose to use the KAC bus, it generally would pick them up at their homes, bring them to the KAC, and return them home at the end of the day. Gum utilized this transportation service on a regular but not exclusive basis.

¶6 For a client scheduled to ride the bus home, the "typical pattern" at the end of the work-training day would be for the client to leave the work floor, collect his or her things and maybe use the restroom, and then proceed to "the exit

for pick-up.” The KAC bus driver would have a “manifest” with the names of those clients who were expected to take the bus home. The KAC staff would monitor the dismissal “[b]y physically being present ... and mak[ing] sure that people get on the bus, mak[ing] sure the bathrooms are cleared.” Weyker confirmed that “the employees of the [KAC] would attempt to flush out every client that had been there that day to be sure he or she receives their respective transportation.” Although this was “not a written procedure, it was practice that ... did occur,” and to the best of Weyker’s knowledge “would have occurred on November 2 as well.” If a client whose name was on the manifest did not board the bus and the employees could not “account” for the client, the “[s]taff would be engaged” and “would page—use an overhead paging system—the individual, and we would send staff to look for the individual.”

¶7 Weyker confirmed her interrogatory response that stated Gum had been recorded as being picked up by the KAC bus on November 2, worked at the KAC, but had been “marked absent for the return route home.” She testified that the bus driver did not notify the staff monitoring the dismissal that Gum had not boarded the bus and that she and other staff were not aware “there was anything amiss.” She further testified that Gum had a usual case manager at that time, but that another KAC employee, Jeanne Klemp, was covering that case manager’s case load, including Gum, on November 2.

¶8 Klemp also was deposed, and provided the following testimony. At the time of the assault, she had between fifty and sixty clients on her case load, as well as being responsible for the case load of Gum’s usual case manager who was on leave. Klemp confirmed that on and around November 2, Gum was permitted to go outside for unsupervised smoke breaks and to walk alone from one KAC building to the other. Based on her prior experience working with

developmentally disabled adults, Klemp considered Gum to be “higher functioning.”

¶9 Klemp testified that clients would utilize a variety of means of transportation, including the KAC bus, for getting to and from the KAC. When clients arrived on the bus in the morning, Klemp would greet them and make sure they got to their correct work station. Throughout the day, she would check up on clients “to make sure everything was going okay,” and she would be paged to provide assistance if a client was “having a difficult time.” Klemp also would assist with “the exit procedure” at the end of the work-training day, which she explained as follows:

[Clients] would get their things ... and then they would go out to the bus pick-up area which is in ... the front of the building and you would just be out there and then the bus drivers would have a manifest of who is on which routes and as people entered the bus, they would check it off and then if the person was not there that was supposed to be there that was on their list, they would contact one of the staff members present to say hey, where is so and so and then we would go about trying to locate that individual.

Several staff members would be present to help ensure clients got on to the bus as designated on the driver’s manifest.

¶10 Klemp recalled supervising the dismissal of clients on November 2, and recalled telling her supervisor on November 3 that she had not seen Gum at dismissal time on November 2. She did not recall if the bus driver ever informed her Gum was supposed to ride the bus home but had not boarded, and she had no recollection of looking for Gum at the time of dismissal. In response to a hypothetical situation suggested by Gum’s counsel, Klemp testified that if she had observed a client who was gathered to leave via the KAC bus instead get into a private automobile, she would have approached the vehicle and inquired with

whom the client was departing. She would have done this so as to determine why the person was leaving by a different means of transportation and because doing so would have been “prudent.”

¶11 David Burns was the KAC bus driver assigned to transport clients, including Gum, home on November 2. He provided the following deposition testimony. Burns would have a manifest with the names of the clients he was to transport home from the KAC and, after he “got them all in their seatbelts and everything,” he would check off who was and was not there. If someone on the manifest did not board the bus, Burns would call dispatch “and dispatch would tell me they got picked up or they—you know, by somebody or they went home and they’d tell me what to do and then I would go.” Burns confirmed that, if a client listed on the manifest did not board the bus, he would never leave the KAC without first telling dispatch “[b]ecause you are not supposed to. You always got to let somebody know that this person wasn’t on the bus.” Sometimes dispatch would tell Burns to wait for the missing client and other times would tell him to depart. Burns testified that it was not part of his responsibilities to contact anyone other than dispatch if a client listed on the manifest failed to board the bus and that he was not supposed to leave the bus unattended to look for a missing client himself. In response to a question by Respondents’ counsel, Burns testified that if he left unattended a bus full of clients in order to search for a missing client, the clients left on the bus would “wander off” and be endangered.

¶12 Burns testified that KAC staff would stand near the clients while they waited to board the bus in order, Burns believed, “to make sure they don’t go nowhere and everything.” He did not recall an occasion when staff were not waiting with the clients, adding that “somebody is always outside there with them.”

¶13 Burns testified that Gum rode the bus “almost every day.” Although Burns initially indicated he had no recollection regarding the events of November 2, 2006, after reviewing a November 3, 2006 report prepared by Weyker, he testified that in the afternoon of November 2 he informed dispatch that Gum did not board the bus and that dispatch indicated “[t]hey didn’t know where he was at” but told Burns to depart anyway.

¶14 As previously noted, defendant Hall was the KAC bus driver who, while off duty, assaulted Gum. Hall provided the following deposition testimony. Hall became familiar with and developed sexual feelings for Gum through Hall’s frequent driving of the bus on Gum’s route. On November 2, Hall observed Gum standing “right out the [KAC] front doors” on the KAC property around the end of the work-training day, drove up near Gum, and offered him a ride home. At the time, there were “probably at least upwards to 50 [individuals] standing out there mingling around with each other,” but Hall did not recall if any staff were present. Gum entered Hall’s car and Hall drove him to a park where Hall sexually assaulted Gum.

¶15 Gum was also deposed, and testified that his birthday was May 9, but he did not know what year. When asked if he grew up in Kenosha, Gum responded, “I don’t know.” With regard to his time at the KAC, when Gum was asked if he would walk by himself between the two KAC buildings for his janitorial job, he responded, “I’m not get no break.” When again asked if he would walk by himself from one building to another or if someone had to walk with him, Gum responded, “No, I walk fast.” When then asked, “But by yourself,” Gum responded, “Yeah.” Gum testified that he would take the KAC bus home from the KAC.

¶16 Gum testified that on the day of the assault, he finished his work-training day and then went outside to wait for the bus. While he was waiting for the bus, Hall drove up in his car and offered him a ride home. Hall then drove Gum to a park and “raped” him. Gum stated that he got home at two o’clock in the morning.

¶17 Gum’s sister and guardian, Rachel Morzfeld, testified at her deposition that Gum lives with her and her five children. He came to live with her after their parents died, when he was sixteen years old. She was named as Gum’s guardian in their mother’s will, but testified that she was appointed as guardian because of “his handicap.” She explained his handicap as being “developmentally slow.” After Gum turned eighteen, Morzfeld continued operating as if she was Gum’s legal guardian. She testified that she “thought once I was the guardian I would always be. I didn’t know once he turned 18 I had to go and fill out different paperwork.” Gum’s counsel assisted her in seeking legal guardianship of Gum in 2007, after the assault, so she could “sign paperwork” for Gum in relation to this lawsuit. Morzfeld confirmed that she was appointed permanent guardian for Gum because of Gum’s “mental incompetency,” and testified that Gum receives social security disability payments.

¶18 When Respondents’ counsel asked Morzfeld if anyone had ever told her what Gum’s mental age is, Morzfeld responded that she had been told by health professionals, including a psychologist that tested Gum and treated him after the assault, that Gum’s “behavior or his state of mind” was that of a seven-year-old child. When further asked by counsel if that seemed accurate in light of her own personal experience with seven-year-old children, Morzfeld responded, “That sounds about right for him.” When asked if Gum could be left alone at home, she responded, “Probably for a short time, not long at all.” Morzfeld

testified that Gum does not have and would not be able to get a driver's license, and while Gum has a checking account, Morzfeld is "on the check with him" as a personal representative and "would have to write [and sign checks] for him." She testified that Gum almost always rode the KAC bus to get to and from the KAC.

¶19 In their answer to Gum's second amended complaint, Respondents admit that "from his birth through on or about November 2, 2006 and at all times relevant to these proceedings, [Gum] has suffered from permanent cognitive disabilities which by November 2, 2006 rendered him with the cognitive capabilities of a young child." Respondents further acknowledge in their answer, on information and belief, that "prior to November 2, 2006, and at all times relevant to these proceedings, the KAC had actual and imputed knowledge of Mr. Gum's cognitive disabilities and mental limitations."

¶20 Respondents moved for summary judgment, and Gum moved for partial summary judgment on the issues of duty and breach. In its oral ruling on the motions, the circuit court stated that on November 2, 2006, Gum was "a legally competent person" who had "the legal right to go where he wanted when he wanted" and he could choose either to take or not take the KAC bus home on any given day. The court held that Respondents owed Gum no duty of care at the time Hall picked him up and sexually assaulted him, stating that "foreseeability is not in the picture." The court denied Gum's motion and granted Respondents', dismissing all claims related to Respondents. Gum appeals.

Discussion

¶21 Our review of a decision on summary judgment is de novo. *Behrendt v. Gulf Underwriters Ins. Co.*, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of

material fact and the moving party is entitled to judgment as a matter of law. *Id.* We view the facts in the light most favorable to the nonmoving party. *Id.*

¶22 Gum’s complaint alleges multiple negligence causes of action against Respondents. “The analysis of the four elements necessary to state a claim for actionable negligence is the first consideration for a court when deciding motions for summary judgment....” *Id.*, ¶14 (citation omitted). “The four elements are ‘(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.’” *Id.* (alteration in original) (citing *Rockweit v. Senecal*, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995)).

¶23 Our supreme court has stated: “A defendant’s duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to someone is foreseeable.” *Rockweit*, 197 Wis. 2d at 420 (citation omitted). This is true “even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act.” *A.E. Inv. Corp. v. Link Builders, Inc.*, 62 Wis. 2d 479, 483, 214 N.W.2d 764 (1974); *see also Cirillo v. City of Milwaukee*, 34 Wis. 2d 705, 712, 150 N.W.2d 460 (1967) (citation omitted) (“[T]he law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen.”). “The existence of a duty of ordinary care encompasses what is reasonable according to facts and circumstances present in each individual case.” *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶31, 291 Wis. 2d 283, 717 N.W.2d 17.

¶24 The question of whether a defendant breached a duty—the second element of the negligence analysis—inquires whether a potential tortfeasor exercised ordinary care, i.e., acted reasonably, with regard to a foreseeable danger. See *Rockweit*, 197 Wis. 2d at 423-24; *Nelson v. Nelson Hardware, Inc.*, 153 Wis. 2d 218, 226, 450 N.W.2d 491 (Ct. App. 1989). “[I]n Wisconsin, the elements of duty and breach are usually presented to the trier of fact in a question asking whether the defendant was negligent, and then the elements of causation and damages are addressed.” *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶12, 308 Wis. 2d 17, 746 N.W.2d 220 (citing WIS JI—CIVIL 1005 (2006)).³

¶25 Gum claims Respondents owed him a duty “to protect [him] while he waited on [the KAC’s] campus for KAC transportation home after dismissal,” and that the circuit court erred in concluding to the contrary. While it is not entirely clear from Gum’s briefs whether he is asking us to rule as a matter of law that Respondents did owe him a duty and that they breached their duty, we nonetheless conclude this is one of the “usual[.]” cases where these issues should be decided by a jury. See *id.*

¶26 The record establishes the following. On November 2, 2006, Gum was scheduled to ride the KAC bus home from work-training. It was standard

³ WISCONSIN JI—CIVIL 1005 states:

1005 NEGLIGENCE: DEFINED

A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

procedure for the KAC to have several staff members present in the pick-up area to “make sure that people get on the bus.” KAC employees testified in depositions as to various procedures employed to ensure clients were accounted for from the time they arrived for work-training until they departed on the bus at the end of the day. These included staff greeting clients arriving in the morning and making sure they got to their correct work station, providing a manifest to bus drivers to ensure drivers accounted for all clients who were scheduled to ride the bus home on a given day, numerous staff members monitoring the dismissal to ensure clients boarded the bus if so scheduled, drivers informing dispatch as well as facility staff if any expected clients were missing from the bus, and staff actively seeking out any missing clients. Burns testified that if a client was scheduled to ride the bus home but did not board it, he would contact dispatch for guidance, and when he utilized this procedure in regard to Gum on November 2, 2006, dispatch told Burns to depart even though “[t]hey didn’t know where [Gum] was at.”

¶27 These procedures clearly indicate the KAC’s awareness that its clients required assistance and supervision that other adults would not. Indeed, Burns testified as to the focus on client safety, stating that protocol did not permit him to leave the bus himself to search for a missing client due to concern that clients who had already boarded the bus would “wander off” and be endangered.

¶28 As to Gum’s cognitive functioning, the record provides the following. During oral argument, Gum’s counsel responded to a question by the circuit court regarding Gum’s legal status at the time of the assault by stating that Gum was “a competent adult.” Respondents emphasize this statement in their brief on appeal, and the circuit court appears to have relied upon it as part of the basis for its oral ruling, stating that Gum was “a legally competent person” who had “the legal right to go where he wanted when he wanted.” While it is

undisputed that at the time of the assault Gum's sister had not yet been reappointed as Gum's legal guardian after Gum turned eighteen, it is also undisputed that Gum had a cognitive disability which qualified him for the KAC program and that he had been in the program since 2000. Also, Morzfeld testified that she agreed, based upon her own experience, with the assessment of health professionals that Gum's "behavior or his state of mind" was the equivalent of that of a seven-year-old child. Further, Respondents admitted in their answer to Gum's complaint that "from his birth through on or about November 2, 2006 and at all times relevant to these proceedings, [Gum] has suffered from permanent cognitive disabilities which by November 2, 2006 rendered him with the cognitive capabilities of a young child."

¶29 It is undisputed that the program in which Gum participated was specifically intended to assist persons with disabilities. It cannot be said Respondents bore no responsibility for Gum's well-being throughout the time when the KAC bus first picked him up for the work-training day until the time the bus returned him home. The greater a client's cognitive limitations, the less ability he or she would have to ensure his or her own well-being and the greater responsibility Respondents would have while the client was in the KAC's charge. Based upon the record, a genuine issue of material fact exists regarding Gum's level of "competen[ce]" as an "adult,"⁴ and hence the level of responsibility Respondents had to ensure Gum safely transitioned from work-training to the KAC bus.

⁴ As noted, Morzfeld testified she was appointed Gum's legal guardian after their parents died when Gum was sixteen years old and that she was unaware additional legal steps were needed once he turned eighteen in order to continue serving as his guardian. It is undisputed Morzfeld was reappointed as Gum's legal guardian shortly after initiating that legal process.

¶30 Respondents argue that “the KAC could not have foreseen that Hall, who had left work early to go home because he was not feeling well, would invite Gum into his car, drive Gum to a different county, and then sexually assault him.” But foreseeability of the *particular* harm is not the proper inquiry; the question is whether it was foreseeable that some harm could come to a client awaiting the KAC bus if the transition from work-training to transportation home was not adequately monitored by the staff and/or the KAC bus driver. *See A.E. Inv. Corp.*, 62 Wis. 2d at 483 (“The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act.”). While Gum may have been one of the “higher functioning” clients, who was afforded a “great deal of independence [vocationally],” his cognitive abilities at the time of the assault are clearly in question. Indeed, if other clients who would wait with Gum for the KAC bus were “lower functioning” than Gum, this fact would seem to further increase the foreseeability of some harm befalling someone if the transition from work-training to departure was not adequately supervised. Such harm could take the form of a cognitively challenged client “wander[ing] off” and being struck by a vehicle, robbed and beaten, lost for a length of time—perhaps even after dark and while exposed to the elements—or even enticed into a vehicle by a person with evil intent, as happened to Gum.

¶31 Based upon the record presented, a genuine issue of material fact exists as to the foreseeability that some harm could come to a client such as Gum if the dismissal process was improperly or inadequately monitored. Accordingly, the circuit court erred when it concluded as a matter of law that Respondents owed

no duty of care to Gum with regard to the process of transitioning from work-training to transportation home.

¶32 Because the circuit court granted Respondents' motion for summary judgment on the issue of duty, it did not address the question of breach. Nonetheless, Gum again raises this issue on appeal, arguing that whether Respondents breached a duty of care is a question for a jury. Respondents fail to develop a coherent argument asking us to rule, as a matter of law, that the record requires a holding that it did not breach any duty it might have owed Gum.⁵ Based on the record before us, we agree with Gum that the question of breach is one for a jury.

¶33 The record suggests KAC employees knew clients, including Gum, had special needs requiring that they, as Gum states in his brief-in-chief, "be accounted for at boarding." As Gum argues, with such knowledge KAC employees should have "take[n] reasonable measures to protect clients after training to safely board KAC transportation home." Among other questions related to breach, questions exist as to whether KAC staff was adequately monitoring the dismissal when Gum was enticed into Hall's vehicle. Also, testimony was presented that a bus driver would normally inform staff if an expected client did not board the bus; however, it appears Burns did not do so on November 2, perhaps because dispatch told him to depart despite Gum's failure to board. A reasonable jury could conclude Respondents owed Gum a duty of care

⁵ Respondents state in conclusory fashion that "[t]he circuit court's determination that there was no foreseeable risk also provides the basis for a determination that there was no breach of duty by the KAC. Therefore, the circuit court's granting of summary judgment in favor of the KAC was proper."

and breached that duty. We remand for a negligence determination by a fact finder.

¶34 Respondents also argued before the circuit court that public policy considerations should preclude liability in this case; however, the court did not address the public policy question. On appeal, Gum asks us to address the issue because it “will likely be raised again if this case is reversed.” Respondents answer by suggesting in conclusory fashion and without developing any arguments, that we should alternatively affirm the circuit court on public policy grounds because “[a]ny negligence on the part of the KAC is too remote from the sexual assault committed by Hall” and imposing liability upon Respondents for the harm done to Gum by Hall “would enter an area with no sensible stopping point.”

¶35 As Gum acknowledges, “[i]t is the preferred practice to submit a case to a jury before considering precluding liability.” See *Gritzner v. Michael R.*, 2000 WI 68, ¶26, 235 Wis. 2d 781, 611 N.W.2d 906 (“Before determining whether public policy considerations preclude liability, it is usually a better practice to submit the case to the jury.”). This is the appropriate course of action here. Should public policy issues be raised again after a trial, the circuit court will be in a better position to give first consideration to and articulate its reasoning as to whether public policy should preclude liability in this case.

¶36 As an alternative ground to uphold the circuit court’s ruling, Respondents assert that the three-year statute of limitations for tort actions requires dismissal of Gum’s claims, pointing out that the assault occurred on

November 2, 2006, and Gum did not file this action until March 6, 2012. *See* WIS. STAT. § 893.54(1) (2013-14).⁶ It is Gum’s position that he timely filed his complaint because the time for filing was extended by five years pursuant to WIS. STAT. § 893.16(1). Section 893.16(1) provides in relevant part:

If a person entitled to bring an action is, at the time the cause of action accrues, ... mentally ill, the action may be commenced within 2 years after the [mental illness] ceases, except that ... the period of limitation prescribed in this chapter may not be extended for more than 5 years.

¶37 Our supreme court has interpreted the term “mental illness” in WIS. STAT. § 893.16 as “a mental condition that renders a person functionally unable to understand or appreciate the situation giving rise to the legal claim so that the person can assert legal rights or functionally unable to understand legal rights and appreciate the need to assert them.” *Storm v. Legion Ins. Co.*, 2003 WI 120, ¶46, 265 Wis. 2d 169, 665 N.W.2d 353. The *Storm* court further noted that the condition of mental illness under § 893.16 may overlap the concept of developmental disability, “but it is not congruent with developmental disability.” *Storm*, 265 Wis. 2d 169, ¶48. Whether a plaintiff has a mental illness permitting application of § 893.16 is a question of fact. *Storm*, 265 Wis. 2d 169, ¶5.

¶38 Respondents contend they must prevail on this issue because Gum’s counsel stated at oral argument that Gum was “a competent adult” on November 2, 2006. For the reasons already discussed, however, there is a significant factual question as to Gum’s cognitive ability and that question likewise relates to whether he meets the definition of “mentally ill” for purposes of

⁶ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WIS. STAT. § 893.16. *See supra*, ¶28. Gum argues that whether and how § 893.16 applies involves a mixed question of fact and law that should first be addressed by the circuit court. We agree and direct the circuit court to address this issue upon remand.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

